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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re the Marriage of GREG L. and VALERIE SUNDERMAN GIBBONS.	
GREG L. GIBBONS, **Appellant,** **v.** **VALERIE SUNDERMAN GIBBONS,** **Respondent.**	**A122379** **(Alameda County Super. Ct. No. V0222062)**

In May 2004, Greg Gibbons (Greg) and Valerie Sunderman Gibbons (Valerie)[1] executed a marital settlement agreement (MSA) requiring Greg to pay Valerie family support payments of $1000 per month until December 2005. Pursuant to the MSA, the court "reserve[d] jurisdiction to award child support, retroactive to the date of termination of family support, for each child until the child reaches the age of 18. . . ." A judgment of dissolution, which incorporated the MSA, was entered on May 14, 2004.

In August 2005, Greg began paying child support payments of $500. In August 2007, Valerie filed an order to show cause seeking "child support retroactive to January 1, 2006," the date when family support payments terminated pursuant to the judgment.

[1] We refer to the parties by their first names for convenience and clarity. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475, fn. 1.)

On May 19, 2008, the court granted the order to show cause and ordered Greg to pay, among other things, approximately $24,806 in child support arrearages for 2006 and 2007.

Greg challenges the court's order awarding child support retroactively to January 2006 on two grounds. First he contends "federal law preempts the trial court's power to retroactively modify [child] support prior to the filing of a motion." Second, he characterizes the order as "voidable" because "the trial court exceeded its jurisdiction." We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties married on March 23, 1998, and had two children. Valerie petitioned to dissolve the marriage in September 2002. As mentioned above, a judgment of dissolution, which incorporated the parties' MSA, required Greg to pay Valerie family support payments of $1,000 per month until December 2005. Pursuant to the judgment, the court "reserve[d] jurisdiction to award child support, retroactive to the date of termination of family support, for each child until the child reaches the age of 18. . . ."[2]

Valerie remarried in August 2004. In August 2005, Greg approached Valerie with a proposal that he make child support payments of $500 per month. Greg thought $500 per month was fair because Valerie had remarried and was receiving income from her current husband. He provided her with a proposed stipulated order setting child support at $500, but Valerie refused to sign it. In August 2005, Greg began paying Valerie child support payments of $500 per month.

In August 2007, Valerie filed and served an order to show cause seeking, among other things, "child support retroactive to January 1, 2006." In her declaration, Valerie

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[2] "Family support" means an agreement between the parents, or an order or judgment, that combines child support and spousal support without designating the amount to be paid for child support and the amount to be paid for spousal support. (Fam. Code, § 92.)

averred: "Pursuant to our Judgment filed 5/14/04, the court reserved jurisdiction to award child support retroactive to termination of family support." She also declared Greg had "arbitrarily decided" in July 2005 to pay $500 in child support payments. In opposition, Greg explained that, based on his income, he believed $500 per month was an appropriate amount of child support. Greg asked the court to "order guideline support retroactive" to August 2007, the date Valerie filed the order to show cause because Family Code section 3653, subdivision (a) (Section 3653(a)) and Title 42 United States Code section 666, subdivision (a)(9)(C) (Section 666(a)(9)(C)) precluded the court from ordering child support retroactive to January 2006.

In November 2007, the court made an interim award of child support of $1,481 per month and continued the issue of "support owed from January 1, 2006" for trial. On May 19, 2008, the court granted Valerie's order to show cause. It rejected Greg's argument that state and federal law limited its authority to modify child support retroactively to January 2006. It explained, "[g]enerally, an order for modification of child support can only be made retroactive back to the date of filing of the notice of motion or order to show [cause] for modification. However, [Valerie] is not seeking modification of a child support order. Rather, [she] seeks to enforce the judgment of dissolution entered in May of 2004." The court noted it had the authority to set child support "under the terms of the judgment" and ordered Greg to pay Valerie "$14,748 in child support arrearages for the year 2006 with interest at the legal rate" and "10,058 in [child support arrearages" for 2007, plus "interest at the legal rate."

In an order dated June 17, 2008, the court reiterated the amounts Greg was obligated to pay in child support. Greg appeals from the May 19, 2008 and June 17, 2008 orders. In his briefs, he does not distinguish between the May and June orders. Instead, he merely refers to the court's "retroactivity order" or the trial court's "order retroactively increasing [his] child support obligation." We analyze the rationale set forth in the court's May 2008 order.

DISCUSSION

Greg contends the court's order is unenforceable because it is preempted by Section 666(a)(9)(C). According to Greg, the "court's order retroactively increasing Greg's child support obligation during the time prior to service of Valerie's modification motion is preempted by federal law and unenforceable."

Section 3653(a) provides: "An order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or terminate, or to any subsequent date, except as provided in subdivision (b) or by federal law ([Section] 666(a)(9))." "Subjecting retroactivity to federal law means that orders modifying child support, as opposed to original orders of support, may be made retroactive only to the date of service of the order to show cause or the notice of motion seeking modification." (*In re Marriage of Goosmann* (1994) 26 Cal.App.4th 838, 843; see also Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2008) ¶ 17:76, p. 17-26 [Section 666(a)(9)(C) "sets the date of *service* of the notice of motion or [order to show cause] as the ultimate boundary on retroactivity"].) In other words, Section 3653(a) "permits the trial court to make its ruling retroactive to the filing date of the motion, but no earlier." (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 300.)

The rule regarding retroactivity does not apply, however, where the parties agree to a different result. (*In re Marriage of Czapar* (1991) 232 Cal.App.3d 1308, 1317 (*Czapar*).) *Czapar* is instructive. In that case, the husband and wife owned a plastic extruding company called ACE. (*Id.* at p. 1312.) They separated and the husband fired the wife from her job, prompting her to file an order to show cause for spousal support. In response, the parties stipulated ACE would pay the wife $2,000 per month as a distribution of community property; the stipulation, however, noted the payments were "'subject to being re-classified at the time of trial — in the trial judge[']s discretion. . . .'" (*Id.* at p. 1316.) In the judgment of dissolution, the court reclassified the payments as

spousal support. (*Ibid.*) On appeal, the husband challenged the reclassification, contending it constituted an improper retroactive award of temporary support. (*Ibid.*) Rejecting the husband's argument, the appellate court held the husband "specifically stipulated that the amounts paid to [the wife] by ACE were subject to reclassification, essentially agreeing to just such an action by the court." (*Id.* at p. 1317.)

The same is true here. In the judgment, the parties agreed the court would "reserve jurisdiction to award child support, retroactive to the date of termination of family support, for each child until the child reaches the age of 18. . . ." Thus, the court had the jurisdiction to award child support to December 31, 2005, the date when Greg's obligation to pay family support terminated. Greg does not contend *Czapar* is distinguishable, nor does he contend the court failed to consider the proper factors when it determined whether to order repayment. (See, e.g., Fam. Code, § 3653, subd. (d)(1)-(4).)

We are not persuaded by Greg's second contention that the order "is precluded because the trial court exceeded its jurisdiction." *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 692-697 (*Carlson*) — which Greg cites for the first time in his reply brief — is inapposite. In that case, the deputy district attorney settled a father's child support arrearages without the mother's consent and the court entered a stipulated judgment. (*Id.* at p. 688.) The appellate court concluded underlying judgment was void because the mother did not consent to, or sign the stipulation in violation of Welfare and Institutions Code section 11478.2. (*Id.* at pp. 690, 692.) The *Carlson* court explained the judgment was "invalid," because the trial "court was without authority to enter any judgment upon a purported stipulation to which both parties had not agreed[.]" (*Id.* at p. 696.)

Carlson is inapposite. Here, the court did not settle child support arrearages and enter a stipulated judgment without Greg's consent. The judgment entered in this case incorporated the MSA, wherein the parties agreed the court "reserve[d] jurisdiction to

award child support, retroactive to the date of termination of family support. . . ." This is not a situation like the one in *Carlson*, where one party acted without the mother's knowledge or consent and where the court had no authority to enter a judgment. In the judgment, Greg specifically agreed the court would retain jurisdiction to award child support retroactive to December 31, 2005, the date when Greg's family support obligations ended. As a result, he cannot now complain the court acted in excess of jurisdiction when it awarded retroactive child support.

DISPOSITION

The orders of May 19, 2008, and June 17, 2008, are affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.